STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 18, 2005
v	No. 245099 Van Buren Circuit Court
JUNIOR FRED BLACKSTON, Defendant-Appellant.	LC No. 00-011976-FC

Before: White, P.J., and Markey and Owens, JJ.

PER CURIAM.

Defendant was convicted of first-degree murder, MCL 750.316, and was sentenced to life imprisonment. He appeals as of right, and we reverse and remand for new trial.

This case stems from a homicide that occurred more than fifteen years ago. On the evening of September 12, 1988, Charles Miller disappeared after visiting defendant's Bangor home. On July 10, 2000, Charles Dean Lamp, a co-defendant, led police to a site one-half mile from his home, where the buried remains of a body matching Miller's description were found. Defendant was subsequently arrested and charged in connection with Miller's death.

A jury trial was held in April 2001, and defendant was found guilty of first-degree murder. However, the trial court granted defendant's motion for new trial based on the trial court's misinforming the jury regarding the prosecution's grant of immunity to prosecution witness Guy Carl Simpson in exchange for his testimony. A second jury trial took place in October 2002.

At this second trial, Simpson appeared in court, but resisted giving testimony. He was found to be unavailable, and the court admitted his testimony from the first trial together with an instruction clarifying the prosecutor's grant of immunity. A written statement Simpson had given after the first trial, in which he recanted his testimony, explained why he had testified as he had, and stated that only he and Lamp were with Miller when he was killed, was not admitted.

According to Simpson's testimony at the first trial, which was read to the jury at the second trial, on the evening of September 12, 1988 Simpson was dropped off at the home of defendant and defendant's then girlfriend, Darlene (Rhodes) Zantello, for an unannounced visit sometime between 10:00 and 10:30 p.m. When Simpson arrived, defendant and his one-year-old

daughter were at home, and Zantello may have been there at that time as well. Miller also was at defendant's house when Simpson arrived. Between one-half hour and one hour after Simpson arrived, Lamp, who was also a friend of defendant's, and whom Simpson did not like, arrived at defendant's home. Lamp announced that he wanted to steal some marijuana from a field he knew about. Miller was known to have a knack for finding marijuana plants, and Simpson assumed that it had been planned in advance that Miller would go with Lamp and defendant to get the marijuana. Defendant originally stated that he could not go because he had to stay with his daughter, since Zantello had left by then, and suggested that Simpson accompany Lamp and Miller in his stead. Eventually, however, all four men, together with defendant's daughter, left the home to go steal the marijuana.

Lamp drove into the woods, driving around for approximately forty-five minutes before turning off onto an unpaved "two-track" road and stopping. All four men got out, while the child was left sleeping in the car, and Lamp took a rifle out of the trunk of his car and handed it to defendant. Lamp walked off some distance ahead of the others, allegedly to look for the field, while defendant, Miller, and Simpson followed behind. Shortly thereafter, Lamp called out that he had found the field, and at that point defendant turned and shot Miller one time, and Miller fell to the ground, apparently dead. Lamp then rejoined Simpson and defendant, and Simpson and Lamp moved Miller's body to a nearby, pre-dug grave and placed Miller in the grave. Defendant then jumped down into the grave and returned a moment later with something in his hand, which Simpson believed to be one of Miller's ears. Lamp then filled in and disguised the grave, and the three men returned in Lamp's car, along with defendant's daughter, to defendant's home. Approximately one half-hour later Lamp left to go home, while Simpson remained at defendant's home for the remainder of the night.

Simpson testified that several days after the murder Lamp told him that they had killed Miller because Miller had "gotten in over his head with the wrong people." Simpson testified that defendant told him that he needed to show Miller's ear to Benny Williams. Several days after the murder, Simpson was with defendant when he took a bag, which Simpson believed contained Miller's ear, and threw it in a nearby river.

Simpson admitted that in the past he had told several different versions of the events surrounding Miller's disappearance, including that only he (Simpson) and Lamp, and not defendant, were involved in Miller's death; that an entirely different person, Charles Pippin, committed the crime; and that Miller was not really dead, but rather was simply working in another state. Simpson admitted that he had made his statements with an eye to his own personal gain, and further admitted that if he testified to a different set of events at defendant's trial, he would probably lose his grant of immunity and would risk perjury charges. Simpson also confirmed that Lamp had, in the past, threatened to kill him if he gave any information regarding Miller's murder to the police or if he endangered Lamp's own plea-agreement in any way.

Simpson's testimony as to the events surrounding Miller's death was largely corroborated by Lamp. Lamp, who was testifying pursuant to a plea-bargain under which he was permitted to plead guilty of manslaughter and receive a ten to fifteen year sentence in exchange for his testimony, testified that defendant was angry with Miller because he believed Miller was planning to rob Benny Williams, a local drug dealer who supplied defendant with cocaine. As a result, Lamp and defendant had discussed killing Miller three or four times, and ultimately they decided to take Miller out to a pre-selected, isolated area on the pretext of stealing marijuana,

and to shoot him and bury his body in a pre-dug grave. The two men located an appropriate area not far from where Lamp then lived, off an unpaved two-track road, and several nights before Miller's murder they prepared a grave at this location, with both Lamp and defendant taking turns digging.

Lamp testified that on the night of Miller's murder, he drove to defendant's house, and when he arrived he found that not only was defendant there, but Simpson was present as well. Lamp was not happy that Simpson was there, because they did not like each other, but defendant took him aside and informed him that Simpson was going to assist in the murder. Approximately a half-hour after Lamp arrived, Miller was dropped off at defendant's house, and then the four men, together with defendant's daughter, got into Lamp's car and drove to the pre-selected site. As previously planned by Lamp and defendant, when they arrived at the site, Lamp handed defendant a rifle, which he took from the trunk of the car, and then Lamp walked alone ahead of the others to find the pre-dug grave. When he found the grave, he shouted back to the others and then he heard a single gunshot. He then went back to the others, where he found Miller lying on the ground with blood seeping from the back of his head and defendant holding the rifle in his hands. Lamp, Simpson, and defendant carried Miller's body to the awaiting grave, defendant jumped in and cut off Miller's ear, and then the three men filled in the grave and disguised it so that it would not be discovered. Lamp stated that he subsequently sold the rifle.

Lamp confirmed that he had once threatened to kill Simpson when he found out Simpson was wearing a hidden wire in an attempt to incriminate Lamp and defendant, but insisted it was merely an idle threat and that he had no intention of ever following through on it.

Rebecca (Krause) Mock, Miller's girlfriend at the time of his death, and her sister Roxanne (Krause) Barr, who lived with Miller and Mock at the time Miller was killed, both testified that defendant admitted being present at Miller's murder, although their testimony differed with regard to whether defendant admitted shooting Miller.

Darlene Zantello, formerly Darlene Rhodes, who was defendant's girlfriend at the time of Miller's death, was called to the stand by the prosecution, but denied having any memory of the events of the night Miller died, her prior statements to police, her prior testimony, or an affidavit she signed after the first trial. The court established through questioning that Zantello had been an alcoholic for many years, and had suffered head injuries. The court found Zantello to be unavailable as a witness, pursuant to MRE 804, and permitted the prosecution to read Zantello's testimony from defendant's first trial into the record.

At the first trial, Zantello testified that she lived with defendant in September 1988, that she was pregnant at that time, that on the night of Miller's death she had experienced severe stomach pains and had gone to the hospital. Zantello testified that she spent three or four hours at the hospital before returning home to find the house empty. After unsuccessfully trying to locate her daughter at a friend's, she laid down and fell asleep. She was awakened some time later when defendant and Simpson returned to the house. Zantello testified that she heard Simpson say something to defendant like "that was like a movie with all that blood," and that she very vaguely recalled someone saying something regarding someone's ear being cut off. She also had a vague recollection of Simpson saying something about almost blowing someone's whole head off and about a pre-dug hole. Zantello testified that when Miller's girlfriend, Mock,

came to the house looking for him, defendant denied any knowledge of his whereabouts. A year or two later, however, after Zantello and defendant had broken up, defendant came over to Zantello's house where Mock was then living. He became weepy and said he was sorry that "they did what they did," but he did not say that he himself had done anything.

Following the reading of her testimony into the record, Zantello was recalled to the stand. On cross-examination she denied any recollection of telling police in 1988 and 1990 that defendant was at home when she returned from the hospital. When defense counsel began to question her regarding the affidavit executed after the first trial in which she stated that her first statement to the police was true and her testimony at trial was not, the trial court stopped the questioning on the basis that the affidavit was executed after the first trial, and therefore was not a *prior* inconsistent statement.

Three of defendant's sisters, Shirley Gargus, Sheila Blackston, and Linda Johnson, each testified as to defendant's whereabouts on the night of Miller's murder and confirmed Zantello's assertion that she went to the hospital that night. Gargus testified that on September 12, 1988 around 11:00 p.m. Sheila Blackston stopped by to leave her children for Gargus to baby-sit. Blackston had Zantello with her, and told Gargus that she was taking Zantello to the hospital for stomach pain. Around midnight, Blackston called her from the hospital and asked her to go check on defendant, since he had been left alone with his and Zantello's one-year-old baby. When she arrived at defendant's house a few minutes later defendant and the baby were at home.

Blackston confirmed Gargus' testimony, stating that on September 12, 1988 she took Zantello to the hospital around 11:00 p.m. for stomach pain, and dropped her own children off with Gargus on the way to the hospital. When she returned Zantello to Zantello's and defendant's home after leaving the hospital, defendant was at home.

Johnson testified that on September 12, 1988 she got into a fight with her husband and went over to defendant's house around 11:30 p.m. to calm down. She stated that when she arrived, defendant and the baby were at the house alone, asserted that the only visitor during the time she was at defendant's house was defendant's friend Lonnie Johnson, who visited for approximately twenty minutes around midnight, and told the court that when she left defendant's home at around 12:45 a.m. defendant was still at home.

Defendant also called Benny Williams. Williams asserted that he had not known Miller, that he had never asked anyone to kill Miller, that he did not know anything about Miller's death, and that no one had ever brought him a human ear. Williams did admit, however, that in 1988 he was a cocaine dealer in Bangor. A police officer had earlier testified that the police concluded that Williams was not involved in the murder.

The prosecution's experts expressed the opinion that Miller died from a gunshot wound to the neck. Defendant's experts expressed the opinion that Miller's injuries were caused by blunt force trauma.

II

Defendant first argues that the trial court abused its discretion when it denied his motion for a new trial, which was based on the claim that the court had erred in barring defendant from

impeaching the prior recorded testimony of two witnesses with inconsistent statements made after the two had testified in defendant's first trial but before defendant's second trial. The court agreed that the statements were, in fact, admissible under MRE 806, but determined that they were nonetheless properly excluded because the statements were more prejudicial than probative and, thus, were inadmissible under 403. We agree with defendant that the court erred in denying him the right to impeach the witnesses with these statements.

Whether to grant a new trial is in the trial court's discretion, and its decision will not be reversed absent a clear abuse of that discretion. *People v Jones*, 236 Mich App 396, 404; 600 NW2d 652 (1999). The decision whether to admit evidence also is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of that discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made, *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000), or the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias, *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002). Furthermore, an evidentiary error does not merit reversal in a criminal case unless, after an examination of the entire cause, it affirmatively appears that it is more probable than not that the error was outcome determinative. *People v Smith*, 243 Mich App 657, 680; 625 NW2d 46 (2000), remanded on other grounds 465 Mich 931 (2001).

First, as the trial court recognized, and the prosecution does not contest, MRE 806, rather than MRE 613, governs the use of Simpson's and Zantello's statements for impeachment purposes. MRE 806 provides:

> ATTACKING AND SUPPORTING CREDIBILITY OF DECLARANT
>
> When a hearsay statement, or a statement defined in Rule 801(d)(2)(C),(D) or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

Defendant should have been permitted to impeach the witnesses with their statements under MRE 806, which permits the credibility of a declarant of an admitted hearsay statement to be attacked with any inconsistent statement made at any time, and without regard to whether the witness is afforded an opportunity to deny or explain.

MRE 403 provides that evidence that is otherwise relevant may nonetheless be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. "Unfair prejudice" means more than merely that the evidence is damaging to the challenging party. *People v Mills*, 450 Mich 61, 75; 537 NW2d 909, mod on other grounds 450 Mich 1212 (1995).

Rather, what is meant by the phrase "unfair prejudice" in MRE 403, is "an undue tendency to move the tribunal to decide on an improper basis, commonly, though not always, an emotional one." *People v Vasher*, 449 Mich 494, 501; 537 NW2d 168 (1995).

In other words, evidence is said to be " 'unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury.' " *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001), quoting *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998).

Federal courts have held that Rule 403[1] is an extraordinary remedy, the major function of which is to exclude matters "of scant or cumulative probative force, dragged in by the heels for the sake of their prejudicial effect," and have stated that FRE 403 carries a strong presumption in favor of admissibility. *United States v Grant*, 256 F3d 1146, 1155 (CA 11, 2001), quoting *United States v Utter*, 97 F3d 509, 514-515 (CA 11, 1996), *United States v Cross*, 928 F2d 1030, 1048 (CA 11, 1991), and *United States v Church*, 955 F2d 688, 703 (CA 11, 1992). At the same time, however, federal courts have also noted that a reviewing court must remember that the trial court, and not the appellate court, is in the best position to assess the extent of the prejudice caused to a party by a piece of evidence, and have further stated that when a trial court has given careful attention to a balancing of prejudice and probative value, appellate courts should be particularly mindful of their duty not to reverse absent a clear abuse of discretion. *Vaughn v Willis*, 853 F2d 1372, 1380 (CA 7, 1988), quoting *United States v Long*, 574 F2d 761, 767 (CA 3 1978), and *United States v Garner*, 837 F2d 1404, 1416 (CA 7, 1987).

The general principle that witness credibility is for the jury to determine is not disturbed by FRE 403. Therefore, evidence should not be excluded under FRE 403 because the trial court considers a witness unworthy of belief. Instead, "balancing probative worth against unfair prejudice involves the trial court giving full credit to the [evidence] and then considering probative worth against unfair prejudice." 1 Mueller & Kirkpatrick, Federal Evidence (2d ed), § 94. See *United States v Thompson*, 615 F2d 329, 332 (CA 5, 1980) (reversing trial court because FRE 403 does not authorize judge to "protect" jury from contradictory testimony, nor exclude evidence because judge "does not find it credible"); *Bowden v McKenna*, 600 F2d 282, 284 (CA 1, 1979) (weighing probative value against unfair prejudice under FRE 403 means probative value "if the evidence is believed, not the degree the court finds it believable").

Defendant and the prosecution both discuss *Vaughn*, *supra*, and *Grant*, *supra*, as the relevant cases. The trial court relied on *Vaughn*, *supra*, in concluding that it would have properly barred use of the statements for impeachment under MRE 403. We find *Vaughn* distinguishable and *Grant* on point.

Vaughn involved a civil suit by a prisoner against a guard, alleging that the guard had deliberately or recklessly exposed him to sexual assaults. Another prisoner had given a pretrial

[1] Where a Michigan Rule of Evidence is modeled after its Federal Evidentiary Rule counterpart, this Court can look to federal precedent for guidance. *People v Barrera*, 451 Mich 261, 267; 547 NW2d 280 (1996).

deposition in which he corroborated that the plaintiff had been sexually assaulted, and testified that the defendant guard had told him to keep silent about the assaults and to say that he saw nothing. Before trial, the prisoner witness wrote defense counsel a letter stating that he would not testify at trial and that he would not attest to the accuracy of his deposition. At trial, the witness refused to testify, stating that he feared for his life and the lives of his family members. The court admitted the deposition transcript but did not allow the use of the letter for impeachment. On appeal, the Seventh Circuit upheld the admission of the deposition transcript and the trial court's rulings, concluding that the use of the letter for impeachment would have been more prejudicial than probative.

The court agreed with the trial court's conclusion that the letter "could mean anything. . . . It would not enlighten the jury at all to read this letter," and found the letter "very ambiguous."[2] The court stated that read in isolation, it could not determine the letter's significance. The court also observed that parts of the letter apparently dealt with mistakes the witness had made in his deposition and had been permitted to correct after mailing the letter, so that the comments in the letter could be interpreted by the jury in a manner highly prejudicial to the plaintiff. Further, the court noted the trial court's dilemma arising from the fact that the witness refused to testify because "he was scared to death of the people he is going to testify about." The court observed that if the trial court had permitted the jury to consider the letter, it also would have had to permit disclosure that the letter and the refusal to testify were a product of the witness' fear for his safety and that of his family, and that the defendant had made it clear that he did not want such disclosure made. None of these factors were present in the instant case. The statements here were not ambiguous, there was no danger of misinterpreting their meaning, and there was no impediment to full disclosure of the circumstances of their being made.

In contrast, the facts of *Grant*, *supra*, are analogous. In *Grant*, the prosecution used as evidence against Grant statements made by a co-conspirator in the course of the conspiracy. These statements were admitted under FRE 801(d)(2)(E). Grant attempted to impeach the co-conspirator's statements with an affidavit that his attorney had obtained from the co-conspirator after the co-conspirator was deported to Jamaica. The court did not allow the impeachment, finding that the statements were not inconsistent. The Court of Appeals reversed, finding that the affidavit's statements were admissible for impeachment purposes under FRE 806. The court then addressed the prosecution's argument that the affidavit was inadmissible under FRE 403 because if believed, it would provide a complete defense rather than merely impeaching the co-conspirator's hearsay statements. The court rejected that argument, observing that rule 403 is an "extraordinary remedy" that carries "a strong presumption in favor of admissibility," and that the affidavit could do no more than impeach and could not provide a complete defense if the

[2] The letter read:

> I am not going assign this transcript against V. Willis and V. Terry. Two wrong don't make a right.
>
> I am not going to testify in this case I made a lots of mistakes
>
> I would like to see you person. Let me say this V. Terry don't have anything coming by law.

prosecution requested the limiting instruction to which it would have been entitled. *Grant, supra* at 1155. The court also rejected the prosecution's argument that the affidavit statements were properly excluded because they were unreliable:

> Rule 806 made the statements admissible for impeachment purposes, and the point of admitting inconsistent statements to impeach is not to show that they are true, but to aid the jury in deciding whether the witness is credible; the usual argument of the party doing the impeaching is that the inconsistent statements show the witness is too unreliable to be believed on important matters. *See United States v Graham*, 858 F2d 986, 990 n 5 ([CA5,] 1988) [stating the same proposition]. [*Grant, supra* at 1156.]

In the instant case, recognizing the appropriate standard of review, we nevertheless are persuaded that the trial court abused its discretion in denying the motion for new trial on the basis that barring the use of the statements to impeach the witnesses was supported by MRE 403. The court concluded that use of the statements would have been unfairly prejudicial because the statements went beyond mere statements and were arguments for acquittal, and the court believed that the witnesses had deliberately made themselves unavailable and given the statements "to have [their] cake and it too." However, the statements were not offered to prove the truth of what was in them, but to attack the witnesses' credibility. As in *Grant*, the very reason the court excluded the statements, because it questioned the veracity and credibility of the witnesses, made the statements all the more probative on the credibility issue. Defendant should have been free to show the jury that the witnesses were unworthy of belief. Credibility is always a question for the jury, and the court erred in concluding that it would have been proper to insulate the jury from the witnesses' contradictory statements. Further, the court was free to redact any portions of the statements that did not amount to a statement inconsistent with the witness' hearsay statement.

In a supplemental brief filed in propria persona, defendant raises a similar argument with respect to other witnesses who would have testified to prior inconsistent statements of Simpson in which he stated that only he and Lamp were involved in Miller's murder. Anticipating defendant's calling such witnesses, as was done in the first trial, the prosecutor asked the court to exclude the testimony of any witness who would testify to a prior statement that was not brought to the witness' attention under MRE 613(b). Defense counsel agreed that she intended to call a number of such witnesses, and had affidavits from such witnesses, including some who were not known at the time of the first trial. The court ruled the testimony inadmissible. For the reasons discussed above, this testimony was admissible under MRE 806, and the court erred in excluding it.

We reject the argument that the court's error was harmless because Simpson and Zantello had already been effectively impeached with inconsistent statements at the first trial. The jury heard evidence that Zantello's first statements to police were that defendant was home when she returned from the hospital, and that she knew nothing about Miller's disappearance except that defendant was not involved. However, these statements were given shortly after Miller's disappearance, and when Zantello was living with defendant. The jury could have easily decided that the earlier inconsistent statements did not undermine the trial testimony, reasoning that Zantello had given a statement in March, 1990 that incriminated defendant, and that at the time of trial, Zantello was no longer involved with defendant, and was therefore no longer willing to

lie in his behalf. The fact that Zantello reaffirmed her earlier position shortly before the second trial would have undermined her trial testimony in a way that the earlier statements could not.

Regarding Simpson, although he was impeached with having given prior inconsistent versions of what happened to Miller, as set forth above, and he admitted at the first trial that he had told Jody Harrington shortly after the shooting that only he and Lamp were involved, he also admitted telling police that he never made such a statement to Harrington. Further, Detective Sergeant Averill testified that Simpson had remained consistent in the version of events he claimed to have witnessed, and stated that Simpson's testimony at defendant's first trial had been consistent with this version of events. Had Simpson's inconsistent written statement and the testimony of other witnesses regarding other inconsistent statements been admitted under MRE 806, the jury would have had a very different view of Simpson's credibility. We conclude that defendant has shown the requisite prejudice - - that upon a review of the entire record, it is more probable than not that the error in denying the admission of substantial impeachment evidence was outcome determinative.[3]

In light of this conclusion, we do not reach defendant's additional claims of error, except to note that if Simpson is again declared to be unavailable, his refusal to testify should be clearly developed on the record.

Reversed and remanded for new trial. We do not retain jurisdiction.

/s/ Helene N. White
/s/ Jane E. Markey
/s/ Donald S. Owens

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[3] Defendant asserts that the error denied him his constitutional right to confront witnesses against him. The prosecution concedes

> In reviewing the parallel federal rule of evidence, FRE 806, the federal courts have found that the improper exclusion of impeachment evidence implicates a defendant's right of confrontation where the trial court admitted the testimony of an unavailable hearsay declarant. See *United States v Burton*, 937 F2d 324, 328 (CA 7, 1991); *United States v Moody*, 903 F2d 321, 329 (CA 5, 1990); and *Smith v Fairman*, 862 F2d 630, 638 (CA 7, 1988).

Under standard of review, the prosecution states, "As a preserved claim of constitutional error, this Court must determine whether the people have established beyond a reasonable doubt that any error was harmless. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999)." The prosecution argues that there was no error because the impeachment evidence was more prejudicial than probative, and that even if there was error, the error is harmless in light of the other impeachment evidence. We have rejected these arguments above. Although conceded by the prosecution, we do not decide whether the error is of constitutional magnitude, and instead have analyzed the case under the more stringent standard applied to non-constitutional error.